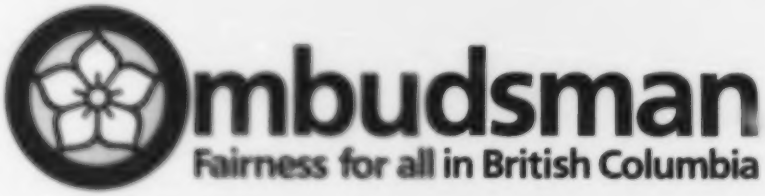
The Administration of the Residential Tenancy Act

Public Report No. 27

October 1991



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October 1991

THE ADMINISTRATION OF THE RESIDENTIAL TENANCY ACT

PUBLIC REPORT NO. 27

This is a study of the Residential Tenancy Branch of the Ministry of Labour and Consumer Services. The Residential Tenancy Branch administers the Residential Tenancy Act.

The study focuses on the legislative mandate of the Branch and on the relationship between the Branch and the arbitrators who make rulings under the Residential Tenancy Act. It is one of a series of systems studies conducted by the Ombudsman Office over the past five years. These studies focus on the administration of services and programs which have a significant impact on individual members of the public.

Many of the services the Branch offers to clients do not have a specific mandate in the Residential Tenancy Act. This does not mean, however, that these services are not in the public interest. We assume that these services have evolved because the public needs them. At this point in its evolution, however, the Branch is faced with administrative choices which are difficult to make without an appropriate mandate.

The arbitrators are independent contractors and independent decision-makers. The concept of "independence" implies that the contractor/decision-maker should be free from control and interference in the decision making process.

Under some circumstances, an independent contractor may be expected to provide all of the tools necessary to carry out the work. In the context of the Residential Tenancy Branch, this is taken to mean that arbitrators must perform all of the clerical and administrative tasks associated with making rulings under the Residential Tenancy Act.

During the course of this study, we have noticed that the Branch is inconsistent in its recognition of the arbitrators' independence. The Branch is very clear in its requirement that arbitrators provide their own clerical and administrative services. The Branch is much less clear in respecting the right of the arbitrators to be free of control and interference in the way that arbitrations are conducted.

Although we have made a number of observations which indicate that some of the administrative practices of the Branch are inappropriate, these practices do not reflect poor management. In many ways, the problems which have arisen demonstrate the tension between the Branch's sincere desire to improve the quality of service the public receives, and its lack of a legislative mandate to do so. The challenge for the Branch is increased by the large numbers of arbitrations conducted each year, which it handles with efficiency and with a relatively small number of complaints.

The Office of the Ombudsman does not attempt to evaluate the policy choices reflected in legislation. However, it does have a responsibility to comment on aspects of legislation (and the accompanying administrative scheme) which frustrate its intent or cause some unintended effect.

There is a significant difference between the legislation set out in the Residential Tenancy Act and the administrative scheme which has evolved from it. This administrative scheme may have developed because

the legislation does not fully meet the needs of the public.

We would like to acknowledge the Ministry, the Branch and the arbitrators for the time and effort they devoted to discussing the issues with us. We were impressed by the committment of the Branch directors and managers to improving the quality of service to the public, and by the professionalism and many thoughtful comments of the arbitrators. We would also like to recognize the considerable efforts of Ombudsman Officer Elizabeth Nicholls, who was the lead investigator for this study.

We trust that this report assists government as it reconsiders this administrative scheme.

Stephen Owen

Stephen Owen
Ombudsman

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CHAPTER ONE

RECENT

RESIDENTIAL TENANCY LEGISLATION

IN BRITISH COLUMBIA

In 1973, the Attorney-General of the Province of British Columbia requested a report from the Law Reform Commission on landlord and tenant issues. The Commission's report - Landlord and Tenant Relationships: Residential Tenancies - was the genesis of the legislation introduced by the government in 1974. Many of the basic concepts of that legislation remained in effect, with some amendments and fine-tuning, until 1984, when the present Residential Tenancy Act was proclaimed.

In this report, we have referred to the legislation in effect between 1974 and 1984 as the **Rentalsman** legislation. We have referred to the legislation proclaimed in 1984 and currently in effect as the **RTA**.

The Rentalsman Legislation

The Rentalsman legislation is perhaps most widely remembered for the rent controls it introduced. However, it also introduced a completely new way of resolving disputes between landlords and tenants. Previously, only the courts could make a binding ruling

on the rights of the parties. Under the new legislation, a Rentalsman was appointed with wide powers to resolve and make binding rulings on disputes between landlords and tenants. He was also given a duty to educate and inform the public about their rights, to investigate complaints, and to mediate disputes.

Under a later version of the legislation, he was given the power to reconsider his decisions, and to change them. If a decision was reconsidered and a party was still unhappy with it, there was a right to apply to either the County or Supreme Court for a review by a judge. (This process, called **judicial review**, focused on procedural fairness and did not provide a full appeal on the merits of the decision.) The Rentalsman legislation established the grounds upon which a party could ask for judicial review, and listed the powers of the judge in reviewing the decision.

Administration of the Rentalsman Legislation

The Rentalsman legislation outlined the rights and obligations of landlords and tenants. The Rentalsman was responsible for the administration of the mechanisms for resolving disputes, in accordance with the legislation. He was also responsible for the delivery of the information, complaint investigation, and mediation services listed in the legislation.

The Rentalsman was appointed by the Cabinet. He was appointed for a five year term, to hold office during "good behaviour". Unlike an appointment "at pleasure", the use of this term meant that the Rentalsman could not be dismissed unless he had given cause. Consequently, he had some protection from inappropriate interference. He could not be dismissed just because the government of the day did not like his decisions.

The Rentalsman's main office was in Vancouver. There were regional offices in Victoria, Cranbrook, Kamloops, Kelowna, and Prince George. All of these offices had clerical staff, information officers, and rentalsman officers. The rentalsman officers heard disputes and made rulings. Outside these areas, landlords and tenants could submit their disputes to the Rentalsman in writing. Officers also travelled around the province to increase the opportunity for local hearings.

The information officers and rentalsman officers were public servants employed by the government. As permanent employees, they were not appointed for any specified term. Within the public service hierarchy, the rentalsman officers did not hold senior positions. They were subject to considerable direction and supervision in the process of hearing and resolving disputes. The Rentalsman generated detailed policy guidelines to assist officers in making decisions, and decisions were published and circulated. There were frequent applications for judicial review from decisions of the Rentalsman's office.

Critics of the system argued that it was slow, expensive, bureaucratic, overly subject to the personal views of the person holding office as Rentalsman from time to time, and lacked finality. Others believed that the review mechanisms provided a safeguard to ensure that the parties had an adequate opportunity to present their cases.

In 1984, the legislature repealed the Rentalsman legislation.

The Residential Tenancy Act of 1984

The government introduced the Residential Tenancy Act in 1984.

The RTA made significant changes in the role the government plays in resolving disputes between landlords and tenants. The RTA reflects the government's decision to be less involved in the resolution of these disputes and in the regulation of landlord and tenant relationships than it had been under the Rentalsman scheme.

The RTA eliminated many of the rent control and rent review provisions of the Rentalsman legislation, although it continues to limit how often a rent increase can be given. It also requires the landlord to give three months' notice of an increase.

The RTA introduced a new method for resolving disputes between landlords and tenants. Under the RTA, landlords and tenants are "deemed" to have agreed to submit disputes about the tenancy to an arbitrator. ("Deemed" means that the parties are considered to have done something, even though they may not actually be aware of the issue or have thought about it.)

A landlord and tenant may agree in writing that disputes shall not be submitted to an arbitrator, or one of them may apply to a court for an order that the dispute not be referred to an arbitrator. However, unless they agree or a court makes an order, the RTA provides that disputes will be resolved by an arbitrator.

The RTA distinguished at first between disputes which involved money and those which did not. The legislation provided that non-monetary disputes would be arbitrated. Monetary disputes were to be pursued

through the courts. In 1989, the RTA was amended, and arbitrators acquired the legal power to rule on monetary disputes. As of February 1991, they may deal with any dispute where the amount involved is $10,000 or less.

The parties are free to choose any arbitrator they wish, provided that they can agree on who the arbitrator should be. One party cannot force the other to choose a particular arbitrator. If the parties choose an arbitrator themselves they are in effect opting out of the RTA system and they will bear the responsibility for paying his or her fee and expenses.

If the parties cannot agree on an arbitrator or do not wish to look for one, they may apply to the registrar to have an arbitrator appointed. The RTA says that "registrar" means the registrar of the Residential Tenancy Branch of the Ministry of Labour and Consumer Services. The registrar is the person who keeps the register, or list, of arbitrators who are to hear disputes.

When the registrar assigns an arbitrator, the arbitrator can only decide disputes specifically noted in s.13 of the Act. The government pays the arbitrator's fee and costs and the party applying to have an arbitrator assigned pays a fee which is presently set at $35. This is considerably less expensive than it would be for the parties to pay for an arbitrator themselves.

The Minister of Labour and Consumer Services appoints arbitrators who may then be "designated", or assigned to a dispute, by the registrar. The RTA gives the Minister the power to decide how much arbitrators will be paid by the government for their fees and expenses.

The RTA also says that arbitrators appointed by the government are not employees of the government. The

RTA does not say that the arbitrators are appointed either "at pleasure" or during "good behaviour". It does not define the relationship between the arbitrators and the government. There is no indication in the RTA that the government intended that the arbitrators should have any continuing legal relationship with the government beyond the assignment to a particular dispute.

Whether appointed by the Minister or chosen privately, an arbitrator has the power to make rulings about almost all disputes arising out of the tenancy, as long as the amount of money claimed does not exceed $10,000. Arbitrators have the power to decide what procedure they will use to hear a dispute. Unlike judges, they are not bound by legal precedent. This means that they are not required to follow decisions made in previous cases involving the same issue. The RTA does not require them to give reasons for their decisions and it does not require them to give their decisions in writing, unless a party requests a written decision. A party may be represented at a hearing by a lawyer or by anyone else he or she may choose.

The RTA provides that an arbitrator's decision is "final and binding". In general, arbitrators do not have the legal power to reconsider or change their decisions once they have been made. The "final and binding" clause means that arbitrators' decisions generally cannot be appealed to the courts.

However, if a party feels that an arbitrator's hearing was unfair or that the decision was totally unreasonable, that party may apply to the B.C. Supreme Court for judicial review. The RTA does not list the grounds for judicial review or the powers of the judge hearing the application. An application for judicial review of an arbitrator's decision is made under the Judicial Review Procedure Act. This statute governs all applications for judicial review of decisions made

by government-appointed bodies. It is not specifically designed for judicial review of residential tenancy arbitrations. The filing fee for an application for judicial review is currently $100.

Although the Ministry has a general mandate under the Ministry of Consumer and Corporate Affairs Act to provide information about consumer matters, the RTA does not contain any provisions creating an agency with the duty to provide information to the public, to advise landlords and tenants about their rights, to investigate complaints about contraventions of the Act, or to mediate disputes. The only mention of a Residential Tenancy Branch is in the definition of registrar. The only function of the registrar mentioned in the RTA is to assign arbitrators to hear disputes. The RTA does not say what the Residential Tenancy Branch is or what it is to do.

CHAPTER TWO

THE MANDATE OF THE RESIDENTIAL TENANCY ACT

The Arbitration Scheme

From the provision in the RTA authorizing a registrar to designate arbitrators has grown an administrative system which has no clear basis in the legislation. Why does the Branch perform the administrative functions and offer the services it does?

The RTA defines some rights of landlords and tenants, allocates the resolution of disputes to arbitrators, and defines the powers of the arbitrators. It gives the Minister the power to appoint and pay arbitrators. The only administrative provisions the Act and the regulations contain are those requiring a registrar to assign disputes to arbitrators on request and to receive notices of mobile home pad rent increases.

When this legislation was drafted, the government may not have intended to provide any services or to carry out any administrative functions beyond assigning disputes to arbitrators. Historically, arbitration has been viewed as a method of resolving disputes privately. It may be particularly appropriate where the outcome is of importance only to the parties to the dispute.

Many aspects of the RTA are more consistent with the idea of a private method of resolving disputes than they are with that of a government agency with a broad role to play in landlord and tenant issues. The fact

that there is no specific, statutory mandate to provide information, mediation or complaint investigation services is consistent with this view of the legislation.

The powers of the arbitrators are also consistent with this view. In a system of "private" arbitrations there is no reason for the decisions of arbitrators to be consistent with each other or to provide mechanisms to ensure consistency. It is the essence of a private arbitration that the decision bind only the parties to it. For that reason, it would not be necessary to generate information about arbitrators' decisions.

If this is an accurate description of the government's intention, how could it have been given effect? Arbitrations of commercial disputes may provide some indications. The B.C. International Commercial Arbitration Centre, which assigns arbitrators under the Commercial Arbitration Act, does not retain arbitrators on contract or enter into any other kind of on-going legal relationship with them.

The Centre maintains a list of qualified arbitrators to whom disputes may or may not be assigned. If the Centre is not satisfied with an arbitrator, it ceases to assign disputes to him or her. The fact that an arbitrator is on the list creates neither a legal obligation nor an expectation that disputes will be assigned to him or her. Even though an arbitrator is on the list, the arbitrator may never be assigned a dispute.

There is nothing in such a system which is inconsistent with the RTA. The government might have developed a set of minimum qualifications for arbitrators. A program might have been designed, perhaps through the Justice Institute, offering instruction in the legal rights of landlords and tenants and training in conducting residential tenancy arbitrations. Those who

met the minimum qualifications and had completed the program could have applied to have their names placed on the list. The government might even have published the list so that the parties could choose their own arbitrator.

Such a system has some obvious advantages for cost-saving, at least over the short-term. Much of the administrative machinery the Branch presently needs would be almost completely eliminated. There would be no need to provide information services, since in a private arbitration scheme individual disputes are not seen as having any relationship to each other. If the Branch was not satisfied with a decision, it could immediately cease to assign disputes to that arbitrator. However, the lack of information about the rights and obligations of landlords and tenants might well mean that a high proportion of disputes would require arbitration. Over the long term, this is expensive.

Whether such a minimalist interpretation of the legislation can be justified when the government, not the parties, has made the decision to submit a dispute to arbitration is another question. The problem is compounded when the government also selects and pays the arbitrator.

The voluntary choice to submit a dispute to arbitration and the essentially private nature of arbitration have had a significant impact on the legal rights which have traditionally been associated with the process. For example, the tradition has been that there are very limited rights of appeal, if any, from the decisions of arbitrators. This is reflected in the RTA provision that arbitrators' decisions are final and binding. But what makes sense for a process which has been chosen freely, with the conscious intention of the parties that it will provide a fast and final resolution to a

dispute, may not make sense when that voluntary element of choice is lacking.

A more fundamental question may be whether such a scheme is appropriate when the issues being arbitrated are of broad public interest. Residential landlord and tenant relationships generate disputes about a relatively small number of recurrent issues which affect all landlords and all tenants.

This is the most significant difference between residential tenancy arbitrations and commercial arbitrations. The Commercial Arbitration Act may apply to almost any kind of commercial dispute the parties choose to arbitrate. A decision made about an issue in one commercial arbitration may have no bearing at all on the issues which arise in another.

When residential landlords and tenants disagree about the consequences of a failure to pay rent, or the conditions under which a security deposit must be returned, does it make sense to have many different and inconsistent rulings? Such differences are likely to occur in a private arbitration system.

There is a strong argument to be made that landlords and tenants need to know their legal rights and obligations, and need a consistent and effective way of resolving disputes. Disputes are less likely to occur when the parties are fully informed of their rights and know how those rights will be enforced. Arbitrators who hear residential tenancy disputes regularly may develop more expertise and consistency than arbitrators to whom such disputes are assigned infrequently. Fewer disputes mean a less expensive system for the taxpayer, as well as a more stable residential housing market. In an arbitration scheme where the result is unpredictable, the public interest may not be well served.

Public Reaction to Bill 5

At the beginning of this chapter, we asked why the Branch offers services and performs administrative functions for which there is no specific statutory mandate. At least part of the answer may lie in the context in which this legislation was introduced. When the government first decided to repeal the Rentalsman legislation, it introduced draft legislation which was widely criticized, particularly by tenants' groups. Bill 5 eliminated the Rentalsman's office, shifted all disputes back to the courts, gave landlords the power to evict tenants without cause, and eliminated rent review.

The government withdrew Bill 5 after first reading, and some months later the RTA was proclaimed. The RTA may represent the government's desire to meet the public demand for a middle ground between the two extremes of the Rentalsman legislation and Bill 5.

The first policy and procedure manual developed at the Branch speaks of a "ministerial mandate" to provide services. The manual says:

> The mandate of the RTB is dual: the statutory mandate and the ministerial mandate....The statutory mandate obliges the Registrar ... to receive applications for arbitration, and upon receipt of the application, to designate an arbitrator and set the time, date and place of the arbitration hearing....The ministerial mandate adds the provision of information and mediation services....The Office therefore performs three principal functions: Arbitration, Mediation, and Information.

The ministerial mandate to provide these services may have reflected a recognition that there is a public

need for these services. However, when a complex administrative system develops outside of legislative direction, a number of problems can develop. What criteria are to be used to evaluate it? How can it be audited? How does the Ministry choose between one service and another when resources are limited?

Recently, some of the services the Branch has offered since the days of this ministerial mandate have been altered or eliminated. The choices which have been made do not appear to have been based on any clear policy direction about the role the government wishes to play in residential landlord and tenant disputes.

CHAPTER THREE

THE RESIDENTIAL TENANCY BRANCH

Services Offered by the Branch

From the start, there has been a significant demand for the services of the arbitrators appointed by the Minister. Because the government pays the arbitrators, there is no incentive for landlords and tenants to choose private arbitrators. Consequently, it is likely that almost all residential landlord and tenant disputes in the province are heard by arbitrators appointed and paid by the government.

Management Structure

Since the legislation was proclaimed in 1984, the registrar has been an employee of the Residential Tenancy Branch (called the **Branch** in this report). The Branch is part of the Ministry of Labour and Consumer Services. The Branch provides a number of services in addition to assigning disputes to arbitrators.

The Branch is administered by a director who reports to an Assistant Deputy Minister of Labour and Consumer Services. Between 1984 and 1989, the Branch also employed a registrar who supervised most of the administrative functions of the Branch. In 1989, both the director and the registrar resigned and the management of the Branch was restructured.

In 1990, a new director and three managers reporting to her were appointed. One manager administers the Victoria office of the Branch, which handles all arbitrations for Vancouver Island and the north coast area. The other managers and the director are located at the Burnaby office of the Branch. One manager is responsible for the administration of all Lower Mainland arbitrations. The other is responsible for the administration of all arbitrations in the "Regions" - the rest of the province. The manager for the Regions also supervises the information services of the Branch. The functions of the registrar are exercised by the director. In practice, many of these functions are delegated to her administrative staff.

The Branch received 12,000 applications for arbitrators last year and the number is steadily increasing. The Branch initially estimates the time needed for arbitrations and sets the arbitrators' schedules, although these can be changed later at an arbitrator's request once the arbitrator becomes aware of the issues involved. The Branch decides which arbitrator will be assigned to a dispute. It maintains various records relating to the arbitrations. These include the names and addresses of the parties, the nature of the dispute, the name of the arbitrator, and the arbitrator's ruling.

In Burnaby and Victoria, the Branch provides hearing rooms for arbitrations. In areas of the province where a regional arbitrator has been appointed, hearing rooms are provided through B.C. Access Centres, Government Agents' offices and Courthouses. Where no regional arbitrator is available, hearings are conducted by telephone conference call.

Information Services

Alongside the demand for arbitrators is a demand for information about the rights and obligations of

landlords and tenants. Although there is no specific legislative mandate to provide information services about residential tenancy matters, the Branch has always maintained a staff of inquiry officers to answer questions. The inquiry staff was significantly increased when the arbitrators acquired the power to resolve monetary disputes.

Information services are available at the Branch offices in Burnaby and Victoria. As there are no regional offices of the Branch, people outside these centres telephone the Branch for information. The Branch does not have toll free lines. Where available, Government Agents around the province will telephone the Branch so that the call is made at the government's expense, but for most people, this is not a convenient way of obtaining information. The Government Agents do, however, stock application forms and brochures.

There appears to be an enormous demand for toll free telephone information services. The Branch monitors incoming calls, and reports that in one recent period, the Burnaby office received 2000 calls in one hour. As a result, the lines are almost always busy, and this is a source of considerable public frustration. The Branch's lack of a clear legislative mandate to provide information services may impede its ability to find ways to meet this demand.

In our comments about the difficulties created by the lack of a legislative mandate, we do not mean to suggest that there is any lack of commitment to improving the quality of service. Currently, the Branch is reviewing its brochures, forms, and other printed information to make sure that they are in plain language and easy to use. These are helpful initiatives, but an appropriate mandate might allow for a more focused approach to solving some of the existing problems.

Mediation and Investigative Services

Until recently, the inquiry officers also attempted to mediate disputes. The ministerial mandate originally recognized mediation as an important way of preventing disputes. Appropriate mediation services may be cost-effective to the extent that they reduce the need for arbitrations. After some complaints were made about the quality of this service, the Branch concluded that the inquiry officers lacked the training and skills necessary to mediate. Instead of providing further training, the Branch decided to eliminate mediation.

The Branch correctly points out that there is no legislative mandate to provide mediation services, but there is also no legislative mandate to provide many of the other services it continues to offer. A poor quality mediation service leads to complaints, and the Branch is anxious to eliminate the sources of complaints. However, there may be a public interest in mediation services which has not been adequately considered in the decision to eliminate this service rather than to improve it.

The present practice of the Branch in investigating complaints about contraventions of the Act is not clear. Again, the Branch does not have a legislative mandate to play any role in investigating complaints about the conduct of landlords or tenants. However, inquiry officers do attempt to investigate complaints and, on occasion, have written to the parties advising them of their rights and obligations under the RTA.

The RTA gives the Branch no powers to enforce the rights of the parties except through arbitration. A landlord's conduct may affect all of the tenants in a building, but an arbitration will determine only the rights of the parties to it. At least in theory, the ruling will not determine the rights of the other

tenants who may be affected by the landlord's conduct, unless all parties agree to have other disputes dealing with substantially similar issues and circumstances resolved by the one process.

The Arbitrators

The Ministry's Contracts with the Arbitrators

Currently, the Ministry has entered into written contracts with eighteen arbitrators who have been appointed by the Minister. In these contracts, the arbitrators agree to be available to conduct arbitrations at the request of the registrar during the limited period the contract is in effect. Although the Branch has the legal power to assign disputes to other arbitrators, it does not do so, except in very rare cases where there is a conflict of interest or other extraordinary circumstance.

The contract was not designed to meet the specific needs of the Branch and the arbitrators. It is in a form which all branches of the government use when they hire people who are not employees to perform specified services for a limited time. The contract says that the person signing it is an "independent contractor and not the servant, employee or agent of the Province or the Minister".

Schedules to the contract allow the government to make some provision for the specific circumstances of that contract. The Ministry uses one of the schedules to define some of the obligations of the arbitrators. For example, the schedule says that the arbitrator will "arbitrate the matter before him in a fair and reasonable manner and to the best of his ability". Other provisions repeat certain aspects of the RTA.

The Arbitrators' Fees

The second schedule outlines the fees and expenses the government agrees to pay the arbitrators. The government pays the arbitrators on a per arbitration basis and they all receive the same fees per arbitration. They receive $50 for arbitrations which do not involve monetary issues (for example, grounds for termination of a tenancy), and $80 for arbitrations where one party claims the other owes him money (for example, security deposit disputes). Arbitrators are paid more for monetary arbitrations on the assumption that on average these hearings will take longer.

The government pays arbitrators $15 per hour for travelling time "outside of [the] designated base". Regional arbitrators often have designated bases which are not in the cities where they live. In these cases, they are no longer paid for their travelling time to and from the designated base. For these arbitrators, the real value of their fees is less than for arbitrators who work from the Branch's Burnaby and Victoria offices. The decision not to pay for all travelling time may affect the ability of the Branch to attract arbitrators to serve the regions of the province. While the Branch reports that this has not been a problem so far, it intends to review the travel rate for the next contract year.

The arbitrators may also request authorization to bill for an arbitration at an hourly rate of $40. This provision is intended to cover hearings which take considerably longer than usual. It is not used frequently. Hearings for orders for possession (made after an order has already been made declaring a tenancy terminated) often take less than thirty minutes, but are paid at the non-monetary dispute rate of $50.

The government's contracts with independent contractors may not be for a term which goes beyond the March 31 fiscal year end. This means that the arbitrators' contracts are never for terms of more than 12 months. Since the beginning of the April 1, 1990 fiscal year, the contracts have been successively for terms of three months, four months, five months, three months, and currently, nine months.

Arbitrators' Access to Facilities

Of the eighteen arbitrators, nine conduct hearings at the Burnaby office of the Branch. Four of these nine work full-time as residential tenancy arbitrators; the others work part-time. Two part-time arbitrators conduct hearings for Victoria. One part-time arbitrator conducts hearings throughout Vancouver Island. Another part-time arbitrator is based in Nanaimo. There are five part-time regional arbitrators who cover some centres in the Fraser Valley, the Okanagan, Kamloops, the Kootenays, and Prince George.

In addition to conducting hearings and making decisions, the arbitrators have recently been required to perform all clerical tasks associated with their work. These tasks range from typing decisions to mailing letters. Most have invested in home computers.

When the Branch was first established in 1984, there were arbitrators only in Vancouver and Victoria. All of the arbitrators were based in the Branch offices, where some clerical support was provided, and there was full access to Branch facilities. The amount of clerical support available varied. Some arbitrators were apparently entitled to receive more than others. Other arbitrators were only entitled to clerical support when staff were not busy with other work of the Branch. At one time, some of the arbitrators had offices at the Branch but others did not. All of the arbitrators had telephones.

When regional arbitrators were first hired in 1989, it became clear that their expenses were considerably greater than those of their Vancouver and Victoria counterparts. Because there are no regional offices of the Branch, there was nowhere for the regional arbitrators to obtain clerical help or to have offices. Consequently, the regional arbitrators provided their own offices, telephones, and clerical help. They did not receive any compensation for providing these services.

The Branch felt that all of the arbitrators should be treated in the same way. One option was to provide consistent clerical support and office space wherever possible. Three of the regional arbitrators made a proposal to the Branch under which they would have shared clerical services. The other option was to withdraw the offices and clerical services of those arbitrators who had previously had access to them.

The Branch chose the second option. The Branch does not appear to have evaluated the effect of inadequate clerical support on the quality of service the public receives, but again, its mandate in this area is not clear. The real value of the arbitration fees decreased for the arbitrators affected, since the clerical work increases the time required to complete each file.

In the Burnaby offices, the nine arbitrators work together in one large room when they are not conducting hearings. They do not have individual telephones, but there are two telephones available for the arbitrators to share. Because the telephones are not assigned to particular individuals, the switchboard operator cannot put calls from the public through to the arbitrators, but instead asks the caller to leave a message.

The Qualifications of the Arbitrators

The qualifications of the arbitrators vary. Since 1984, the Ministry has had various philosophies about the qualifications necessary to conduct a fair hearing and make an appropriate decision. Initially, the prevailing view seems to have been that no special qualifications were necessary. What was required was experience of the world and a common-sense approach. This may have been consistent with the non-monetary jurisdiction then exercised by the arbitrators. It may also have been consistent with the government's initial view of its role in the resolution of landlord and tenant disputes.

As experience of the arbitration system developed, the Ministry looked for applicants who were either lawyers or had legal training, and for applicants with mediation or arbitration experience. The Ministry believes that legal training is a useful and desirable qualification for an arbitrator.

No formal selection criteria have been developed. The appointments are not subject to the hiring procedures contained in the Public Service Act and there is no formal structure in place which would prevent an appointment from being made outside of a merit based selection process.

Of the eighteen arbitrators currently retained by the Ministry, eleven are lawyers, several of whom have a number of years of experience in the practice of law. Two have professional training in alternative dispute resolution. Several arbitrators held senior positions in the Rentalsman system. One is a chartered accountant and trustee in bankruptcy. Many have a professional commitment to arbitration and have taken course work towards becoming Chartered Arbitrators.

Training of Arbitrators

The Branch provides a standard, two day orientation session for new arbitrators. It is conducted by Branch management, sometimes with the assistance of an experienced arbitrator, and includes a guide to the RTA and to the Branch. Following the orientation, new arbitrators may sit in on as many actual arbitrations as they wish to become more familiar with the role. The Branch pays for the arbitrators' expenses in attending this session, but does not pay for the arbitrators' time. It does not consider this to be a training session. There is no probationary period.

Most of the newer arbitrators, and particularly the regional arbitrators, say that they frequently telephone the more experienced arbitrators for assistance with various issues. The Branch sometimes organizes seminars which all the arbitrators attend. These seminars are an opportunity for the arbitrators to review issues of common concern in making decisions under the RTA.

Until 1990, the Branch paid for travel expenses and for the time of the arbitrators attending. It now pays for travel expenses only, on the theory that it is inappropriate to pay independent contractors for the time they spend on professional development.

No courses are available, either at the Justice Institute or elsewhere, on conducting residential tenancy arbitrations.

Evaluation of Arbitrators' Performance

The Ministry enters into contracts with arbitrators which provide that they will be available to conduct arbitrations over a defined period of time. The RTA does not deal with how arbitrators should be retained.

Having decided that it wishes to have arbitrators on contract, it makes sense that the Ministry will evaluate performance when deciding whether to renew their contracts. Complaints about arbitrators from various sources, including complaints made to the Office of the Ombudsman, may raise questions about the quality of hearings or decisions. These complaints also play a part in the evaluation process. No formal criteria or mechanisms have been developed for the evaluation of the arbitrators' performance.

One reason for this lack of a formal process is a concern by the Branch about the arbitrators' status, which affects its ability to assess performance. The arbitrators are "independent decision-makers". Somewhat like judges, the arbitrators are intended to be free of external interference when they make decisions.

For example, if an arbitrator knew that the Ministry disagreed with his or her last decision and that this disagreement formed part of the Ministry's evaluation of performance, the arbitrator's ability to exercise his or her judgment freely might be impaired the next time a similar decision had to be made. As a result, the rights of the parties to a fair hearing might also be impaired. The Ministry also feels that a formal evaluation process is not consistent with the arbitrators' status as independent contractors. (These issues are discussed at greater length later in this report.)

None of this means that evaluation does not occur. Until 1990, the Branch did not play a large role in formally evaluating the quality of arbitrators' performance or in responding to the complaints made by the public. They did not attempt to provide complainants with assessments of their complaints and generally did not make comments to the arbitrators which reflected an evaluation of a complaint.

Proficiency was promoted by seeking and encouraging informal discussion amongst the Registrar and the arbitrators, either individually or in groups. Issues arising from decisions or conduct would be raised and opinions would be shared.

In the view of the Branch at that time, the arbitrators' status as independent decision-makers precluded a more formal evaluation process. The Branch did, however, make recommendations to the Minister about renewal of contracts. These recommendations meant that an evaluation of performance had in fact occurred.

Since 1990, this situation has changed somewhat. The Branch continues to view arbitrators as independent decision-makers, but has decided that under the present legislation it can, and should, play a much more active part in evaluating arbitrators' performance. These measures are intended to lead to a higher overall quality of hearings and decisions, but they were not developed through consultation with the arbitrators.

Managers now review a sample of arbitration files whether or not a complaint has been made about a particular one. If a manager has a concern about something she sees in a file, she questions the arbitrator about it. The Branch also maintains a three-ring binder which contains all complaints received about arbitrators, separated by a tab for each arbitrator. In this way, the Branch makes information about complaints available to each arbitrator. The managers bring each complaint received to the attention of the arbitrator in question. Often, these discussions are felt to be necessary in order to respond to enquiries from the Minister's office.

In attempting to evaluate without interfering with the arbitrators' independence, the Branch makes two significant distinctions. First, the Branch

distinguishes between comments made before and after the arbitrator has made a decision. The Branch believes that any discussion of a file with an arbitrator before a final decision has been made would be an improper interference with the arbitrator's independence. The Branch does not feel that discussions with the arbitrator after a decision has been made pose the same level of concern.

The Branch makes a second distinction between concerns or complaints which involve an arbitrator's manner of handling a file, which can include procedural matters, and those which involve the merits of an arbitrator's decision on the facts or law of a particular case. Managers will raise both types of issue with arbitrators, but while they advise arbitrators of concerns about file-handling procedures, they say that they do not pursue any disagreement over a decision on the merits. The Branch says that it believes such decisions are within the independent authority of the arbitrators, and that an arbitrator's performance in that area is not an appropriate matter for evaluation.

While these two distinctions show a desire to avoid interference with the independence of arbitrators' decision-making, the evaluation process nevertheless remains relatively informal. Under these circumstances, it may be difficult to maintain a clear separation between those issues which form part of the evaluation of performance, and those which do not. Perceptions about what is actually being reviewed at the time of contract renewal may well become confused.

The Branch believes that in the absence of other accountability mechanisms, such as those which an accessible appeal system provides, performance evaluations of arbitrators are in the public interest. If such evaluations are to be conducted, it is important they be fair and accurate. This protects the public interest by ensuring that poor arbitrators do

not continue to be offered contracts by the Ministry and that good arbitrators do not withdraw their services due to unfair treatment.

Even in the absence of a conscious process, whether formal or informal, evaluation of arbitrators' performance is inevitable, insofar as Branch managers cannot fail to be aware of and react to complaints about arbitrators. Evaluation is also in the public interest. But the public interest demands that the evaluation process be fair, consistent and not subject to whim.

If the Branch continues to retain arbitrators on contract, mechanisms should be developed to ensure fair and accurate evaluation. These mechanisms must allow for accountability without impairing independence. They should be designed with the participation of the arbitrators and should formalise the distinctions between issues which do and do not fall within performance evaluation.

The present system presents the Branch with some difficulties in responding to complaints brought by members of the public against particular arbitrators. The Branch knows it faces limitations in assessing complaints, but at the same time wants the public to understand that it is committed to quality service.

As a result, the Branch's letters to complainants may sometimes create the impression that an assessment is being given when in fact it is not. These letters may also suggest that the arbitrators are accountable to the Branch even though the letters state that they are independent decision-makers and that the Branch cannot interfere with a decision once made. These letters may increase the frustration of complainants because they do not provide an assurance of accountability.

CHAPTER FOUR

THE INDEPENDENCE OF THE ARBITRATORS

Two concepts dominate the relationship between the arbitrators and the Branch. These are that the arbitrators are independent contractors and independent decision-makers. What these concepts mean and how they affect the quality of service the public receives are reviewed in this chapter.

In our discussions about ways in which the quality of service might be improved, the Branch commented that certain changes could not be made because the arbitrators are independent contractors. The fact that the arbitrators are independent decision-makers appointed by the Minister also affects the extent to which they are directly accountable for their decisions, if at all.

The Branch has recently made some changes in its relations with the arbitrators which may reflect a new interpretation of the way these concepts affect the Branch. The lack of a clear legislative mandate for the role of the Branch in relation to the arbitrators, and the lack of a mechanism to ensure arbitrator accountability, may offer some explanation for these changes. Perhaps without realizing it, the Branch may be attempting to fill a vacuum created by the absence of formal mechanisms.

However, these new practices may not be consistent either with the traditional definitions of these concepts, or with the legislative mandate of the Branch.

What Do These Terms Mean?

Independent Contractors

The arbitrators' contracts say that they are independent contractors. Independent contractors are self-employed. The distinction between an independent contractor and an employee affects the hiring and firing process, the government's obligation to withhold tax and to provide benefits, and the degree of control the government may exercise over the way the work is done. Legal tests have been developed to determine the true status of a person providing services. In a case called **DiFrancesco v. Minister of National Revenue** (1964) 34 Tax A.B.C. 380, these criteria were adopted:

> A servant (employee) acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course of his work; an independent contractor, on the other hand, is entirely independent of any control or interference, and merely undertakes to produce a specified result, employing his own means to produce that result...
>
> To distinguish between a contractor and a servant (employee), the test is whether or not the employer retains the power, not only in directing what work is to be done, but also of controlling the manner of doing the work. (at 384)

Independent Decision-Makers

Our system of law has recognized for centuries that judges should be independent and impartial decision-

makers. Essentially, this concept means that we believe justice is better served by judges who are free from inappropriate interference. In order to achieve this goal, we give judges security of tenure. This reflects the belief that a decision-maker who has job security will not make decisions which are compromised by the fear of dismissal.

In giving judges this kind of security, we recognize that the goal of freedom from interference is more important in achieving justice than the goal of making judges directly accountable for their decisions. Nonetheless, two mechanisms exist which provide some checks and balances.

First, with the exception of the Supreme Court of Canada, most decisions of judges can be appealed. The courts of appeal provide guidance to the lower courts, and may set aside decisions which are wrong in law. The lower courts are required to follow the decisions of the courts of appeal. Second, judicial councils have been established which review complaints about the conduct of judges and perform a number of other functions.

Consequently, complaints about judges' decisions can be addressed through appeal mechanisms. Complaints about other aspects of the conduct of judges can be addressed through the judicial councils.

Not all decisions which determine the rights of citizens are made by judges. In this century, both the federal and provincial governments have established various kinds of boards, agencies, commissions, and tribunals which make decisions that affect our lives. These government-appointed bodies are known generally as "administrative tribunals". A tribunal may be a group or an individual.

Some of these regulate industries: for example, the communications industry is regulated by the Canadian Radio-Television and Telecommunications Commission. Another familiar example is the B.C. Utilities Commission, which regulates aspects of the way we use energy in B.C.

Other government-appointed bodies make decisions on the rights of parties involved in private disputes where a direct public interest is not necessarily involved, but where the adjudicative function is part of a broader administrative policy. Such bodies often make decisions which once were made by judges. Administrative tribunals which make these kinds of decisions are exercising "quasi-judicial" functions. In doing so, these tribunals must conform to the rules of "natural justice". This means that they are generally required to hold a hearing in order to give the parties to the dispute an opportunity to present evidence and argument. The degree of formality of the hearing will depend upon a number of factors, including the extent of the judicial or quasi-judicial function exercised by the tribunal. We refer to tribunals exercising these functions as "quasi-judicial" tribunals.

Recently, there have been major studies on the relationship between administrative tribunals and the governments which create them. Examples are the Ouellette report commissioned by the government of Quebec (1987) and the Macaulay report commissioned by the government of Ontario (1989). The Canadian Bar Association has studied appointments to federal administrative tribunals (the Ratushny Taskforce of 1988) and the Law Reform Commission of Canada has also produced several studies (1979, 1980, 1982, 1985).

Some of the issues these studies raise are summarized in a recent paper by Prof. Murray Rankin of the Faculty of Law of the University of Victoria, entitled "Issues

of Independence". The paper was presented at a seminar for administrative tribunals in Vancouver in March of 1991, organized by the Canadian Institute for the Administration of Justice.

It is beyond the scope of this report to attempt to analyze all of these studies, but they demonstrate the range of opinion which exists on what independence means, whether tribunals are or should be independent, how independence can best be protected, and how tribunals can be both independent and accountable.

However, there is a general recognition that quasi-judicial decision-makers should be free from inappropriate interference and should be impartial when they make decisions. The public right to a decision arrived at impartially and without interference can be protected both through structural mechanisms and through the "rules of natural justice". The rules of natural justice are legal rules which govern tribunals.

These rules ensure that decision-makers do not exceed their legal powers and remain within the statutory mandate the government has conferred on them. They ensure that discretion is exercised appropriately and that decisions are not based on irrelevant considerations. They require that each party must have adequate notice of the case to be met, and has the right to some kind of a hearing in order to submit evidence and make argument. They protect the parties from biased decisions. These rules can be enforced by the courts.

Structural mechanisms which are intended to protect independence usually involve the selection and appointment process, the length of the appointment term, conditions for the renewal of appointments, and the grounds upon which an appointment can be terminated.

Independence and the Arbitrators

When we consider how the concepts of independent contracting and independent decision-making apply to government-appointed arbitrators, it is clear that to some extent the two concepts overlap. That aspect of being an independent contractor which prevents an employer from controlling how the work is done coincides with the right of a quasi-judicial decision-maker to be independent of inappropriate interference.

However, an independent decision-maker need not be an independent contractor. For example, judges are employees, not independent contractors, for the purposes of taxation. For other purposes, such as appointment and removal, special provisions have been designed for them. The tests developed for the purposes of income tax law do not provide a complete description of the relationship between these decision-makers and the governments which employ them, and may not be helpful in defining the roles of the parties.

Our present concern is with the extent to which the idea that the arbitrators are independent contractors has come to determine the quality of service the public receives. Before the government can determine how arbitrators will be retained, it must first determine what kind of service the public requires. Only then can it make an appropriate assessment of the administrative mechanisms necessary to deliver that level of service.

The problem is complicated by the fact that the present administrative scheme does not have a legislative mandate and may even be contrary to the mandate the government originally intended. However, it may be helpful to consider to what extent the present administrative scheme serves the public interest.

Qualifications and Training

What does the public interest require? First of all, the public interest requires that arbitrators have appropriate qualifications and training. As noted, no formal selection criteria have been developed and there are no mechanisms which would prevent an appointment from being made outside of a merit based selection process.

The Ministry should develop and publish selection criteria, and make a commitment to an appropriate and formal appointment process.

While the Ministry says that it is willing to pay for some courses, it also feels that it should not be necessary to provide any significant training to an independent contractor on the Ministry's time, and that to provide training might even be inconsistent with that status. This assumes, however, that it is possible to retain independent contractors who are qualified to act as residential tenancy arbitrators without any further training. We do not believe this proposition is well-founded.

The Ministry feels that lawyers are well qualified to act as arbitrators. However, most lawyers do not have a substantive knowledge of residential tenancy law and do not have any training in holding hearings. The skills necessary to act as an advocate are not the skills necessary to act as an arbitrator. This is not to suggest that lawyers do not have certain qualifications that may be useful in conducting arbitrations. Lawyers and other people with legal training will have a knowledge of the rules of natural justice and of legal analysis.

Only two of the arbitrators presently on contract had training in alternative dispute resolution before they were hired and, interestingly, neither of them are

lawyers. Those with the most experience in residential tenancy law are the arbitrators who originally worked in the Rentalsman's office, two out of five of whom are not lawyers.

Most of the relatively new arbitrators acknowledge that there is a long learning process, both with respect to how to conduct a hearing and with respect to the law of residential tenancies. One arbitrator commented that the training was shockingly inadequate. In the Burnaby offices where there is immediate access to other arbitrators, the problem may not be so acute. In the regions, however, the lack of training may create real difficulties and, as a result, the public may not be well served.

In our view, the development of a training program for new arbitrators should be seriously considered. This program might best be developed and carried out by the existing arbitrators.

Term of the Appointment

As we noted in Chapter Three, during this and the preceding fiscal year, the arbitrators have been offered a series of short term contracts. The longest of these contracts is the current nine month term which will expire on March 31, 1992.

If the government wishes to continue its practice of having arbitrators on contract, it has an interest in encouraging arbitrators to make a commitment over a reasonable period of time, given the recognition that the learning process is relatively long. Short term contracts may not encourage that degree of commitment. More importantly, the present lack of security of tenure may frustrate a sense of independence.

This is particularly critical in light of the present approach of Branch management to improving the quality

of Branch services. The Branch may need to review its initiatives in this area insofar as they involve offering direction and evaluation to arbitrators. Some sense of the historical importance of the notion of independent decision-making may be helpful to the Branch in assessing its role in this area. Some of its initiatives may also be inconsistent with its own view of what independent contracting means.

In our discussions with the arbitrators, it was evident that there is some lack of trust in the present management of the Branch. Some arbitrators feel that the Branch does not have sufficient respect for the professionalism of the arbitrators. Several of them commented that the attitude of the Branch was "take it or leave it" - the Branch has many résumés on file and can replace an arbitrator immediately. There was a sense that the Branch and the Ministry do not feel that residential tenancy arbitrations involve complex issues or that conducting a hearing requires any significant degree of skill.

While we cannot evaluate whether this perception on the part of the arbitrators is justified, the fact that the perception exists inhibits the arbitrators' ability to act as independent decision-makers. In conjunction with the short term contracts currently in use, the sense of independence may be affected.

Many other independent decision-makers are appointed by an order of the Cabinet for terms of various lengths, often in the range of three to five years. Such terms may offer more appropriate safeguards for impartial and independent decision-making. Alternatively, while the Ministry cannot control the approval of future budgets, it could enter into longer term contracts which contain a condition stating that they are subject to continued funding in subsequent years.

Evaluation and Appointment Renewal

At present, there is no formal evaluation process in which the arbitrators participate. The Branch does, however, evaluate the arbitrators, without always providing for their effective participation, when it determines whether new contracts should be offered to them. The Branch has not yet developed formal evaluation criteria. As noted, the public interest is protected by an evaluation process which is both fair and accurate.

It is difficult to develop a fair and accurate process unless the arbitrators participate effectively in the evaluation. Currently, there is a perception by arbitrators that they may not voice disagreement freely. We have not attempted to assess whether this perception is justified. The Ministry considers that to conduct a formal participatory performance appraisal would be to treat its independent contractors as employees.

The Impact of the Fee Structure on Quality of Service

As noted in Chapter Three, the arbitrators are paid on a per arbitration basis. The Branch initially estimates the time arbitrations will take, and establishes the arbitrators' schedules, before the arbitrators have seen the new files and have become aware of the issues. Presently, the Branch schedules non-monetary arbitrations for one hour; monetary arbitrations for one and one half hours. If the arbitration takes less than the scheduled time, the arbitrator still receives the same fee. If the arbitration takes longer, the arbitrator does not receive extra payment unless he or she requests approval to bill on the hourly rate.

Arbitrators say that the Branch may tend to assume that a request for extra payment reflects inefficiency and

an inability to control the hearing process. The Branch's memorandum to arbitrators of August 20, 1990 states:

> As a general rule, arbitrators are paid on a per file basis. The hourly rate is provided to deal with unusual situations when a hearing is particularly time consuming and it would be inequitable to provide the standard file rate. It is incumbent upon the arbitrators to control the hearing process to ensure that time consuming, irrelevant concerns of the parties or witnesses do not unduly lengthen the hearing process. It is understood that some hearings will require longer hearing time given the nature of the dispute and the extent of the evidence, but it is expected that such cases will be rare.

The hourly rate requests are not approved frequently. There do not appear to be any clear criteria for the use of the hourly rate. Accordingly, the arbitrators rarely make such requests.

The per arbitration fee also covers all of the non-hearing work associated with the case. This includes the clerical and administrative work and the preparation of a written decision. Some arbitrators say that the administrative work can take up to 25% of the total time on the file.

Arbitrators do not consistently provide written reasons for their decisions, and they correctly point out that there is no general legal requirement to give reasons. Many of them use a standard form letter which gives the result without stating what the connection was between the evidence, the law, and the conclusion. There appear to be two explanations for the practice of not giving meaningful reasons more often.

The first is that many of the arbitrators believe that reasons are unnecessary in most of the cases they hear because the parties understand the decision given orally at the end of the hearing. In our view, the arbitrators may overestimate the extent to which the parties have in fact understood why the decision was made, even if they do not indicate confusion at the hearing. We discuss this issue in more detail in Chapter Six.

However, a more significant factor may be that the arbitrators do not receive any extra fees for the time needed to write reasons. In a complicated case, it may take at least an hour to produce even a short set of reasons.

The per arbitration fee system could operate as a structural disincentive to take more than the scheduled one or one and a half hours for all of the work on a file. The fee levels should reflect the time required to deal with all matters necessary to resolve a dispute. Arbitrators say that the fee structure affects their willingness to grant adjournments, to conduct site inspections, and to provide written reasons for their decisions.

Administrative Practices and Quality of Service

The fee structure also indicates that despite the Branch's belief that it respects the independence of the arbitrators, some administrative decisions have an impact on how the arbitrators' work is done and on the quality of service the public receives.

In Chapter Three, we referred to recent changes in the arbitrators' access to Branch facilities. Although the Branch permits arbitrators to use Branch equipment when Branch staff are not using it, the memorandum of August 20, 1990 advised arbitrators that the Branch could not provide "...clerical and secretarial support, including

making photocopies, faxing documents, typing and generating correspondence..."

The decision of the Branch to withdraw these administrative services may be consistent with the status of the arbitrators as independent contractors. However, the extent to which the administrative decisions of the Branch have an impact on the arbitration process might be a more important factor in determining whether the arbitrators actually function independently.

In any event, the decision about what services, if any, should be provided to arbitrators is a decision for the Branch to make. Our concern is with the extent to which the absence of these services may affect the quality of service the public receives.

If it is possible for the arbitrators to provide these services themselves then the public will not be affected. However, some aspects of the present administrative framework may prevent this. If so, the Branch may have eliminated services the public needs where there is no alternative way to provide them.

The problem arises particularly in the Burnaby offices where nine arbitrators work. Not all of them are full-time, but as arbitrations are scheduled for the entire day, there are days when all of them are on site. Not all of the hearings will take the full amount of time scheduled, and so there is "down-time" when the arbitrators are not in hearings. They all try to use this time to complete other work on the files.

We have already noted the limited access to telephones and the fact that the receptionist cannot put calls through to the arbitrators. In our own experience, this is an annoyance for callers. The Branch points out that it is inappropriate for the public to contact arbitrators after a decision has been made.

While this may be true, the argument may not give sufficient weight to the legitimate calls that may arise at other times in the process. For example, during the course of administering an order for repairs, it may be necessary for an arbitrator to have frequent discussions with contractors and the landlord.

The Branch makes a similar point in response to criticisms of the room allocated for the arbitrators' use. The Branch says that it has increased the consistency of decision-making by increasing the arbitrators' proximity to each other. While this may be true, the room presents an unprofessional appearance. That appearance may create a sense of disrespect for the arbitrators, even though that was not intended.

Restrictions on arbitrators seeking necessary administrative assistance from Branch staff may be in conflict with the duty of the Branch and the arbitrators to provide quality service to the public. The Branch should not attempt to reduce its own costs by placing unrealistic administrative responsibilities on the arbitrators, to the detriment of the public.

Administrative Practices and Independence

During our study of the Branch, we interviewed the arbitrators, the managers, and the director. All of them agreed on what it means to be an independent decision-maker. However, the Branch's working definition of what constitutes interference with that independence may not be consistent with the usual definitions. If procedures for evaluating arbitrators' performance are inappropriate, it may be that they have developed because there is no formal, appropriate accountability mechanism.

Some examples may illustrate this. An arbitrator heard a dispute between a landlord and a tenant about whether

the tenant was entitled to the return of a security deposit. The landlord had claimed various expenses against the deposit. The arbitrator concluded, after hearing the evidence of the parties, that the landlord's evidence was not truthful.

He gave written reasons for his decision in which he said that wherever the evidence of the tenant and the landlord were in conflict, he accepted the evidence of the tenant. He used language which is typical of the language judges use in making credibility assessments. After receiving the decision, the landlord complained to the manager.

She reviewed the reasons and concluded that the arbitrator's language was not appropriate. She told the arbitrator that even if the language was typical of the language judges use, it was not appropriate for residential tenancy arbitrators and that it might create an apprehension of bias. She recorded her views in a note to the arbitration file. Although, as noted earlier, the Branch tries to distinguish between issues of an arbitrator's personal style and the quality of the decision, managerial reviews of either can have an impact on independence.

In another case, a party complained that an arbitrator who had ruled against her was biased. A manager wrote to the complainant explaining that the arbitrators are independent decision-makers, and said:

> Although the Branch has no authority to interfere in a decision made by an arbitrator, I have reviewed the files and can find no evidence of bias on the part of the arbitrator....

> Comments from landlords and tenants are very useful to the Branch in monitoring the arbitration system and individual arbitrators.

Such letters may be confusing to the complainants who receive them, and may also convey to the arbitrators that their decisions are being monitored.

The Branch is clearly attempting to respond to public concern. In doing so, they may create the erroneous impression that the arbitrators are accountable to the Branch for their decisions and may intrude on the independence of the arbitrators.

Accountability and Independence

There is confusion about the relationship between the Branch, the arbitrators, and the public insofar as responsibility for the quality of decisions is concerned.

The RTA contains no provisions which suggest that the arbitrators are accountable to the Branch for their decisions. This is entirely consistent with the scheme of "private" arbitrations we described in Chapter Two. In that system, the registrar could immediately cease to assign disputes to arbitrators if problems became apparent.

Most systems of law which place a significant value on the independence and impartiality of decision-makers place less weight on accountability mechanisms. However, these systems usually include the right to appeal a decision.

In the next chapter of our report, we discuss the need for a more accessible and better defined avenue of appeal of arbitrators' decisions. We believe that a

better review mechanism would provide a solution to many of the problems we have described.

CHAPTER FIVE

INTERNAL AND EXTERNAL REVIEW OF ARBITRATORS' DECISIONS

There are several reasons to conclude that an accessible form of review of arbitrators' decisions is necessary. In this report, we have looked at some aspects of the evaluation and complaint-handling processes. There is confusion about the role of the Branch in evaluating arbitrators and responding to complaints.

An appropriate mechanism for reviewing (and, where necessary, changing) arbitrators' decisions would not only serve the immediate needs of the parties who want to obtain a fair decision. It would also offer a more appropriate and accurate means of evaluating the quality of arbitrators' decisions.

It seems likely that such a mechanism would significantly reduce the number of complaints the Branch and the Ministry receive about arbitrators. But even with such a mechanism, questions may still exist about the role to be played by the Branch in responding to complaints which come to it either directly from

clients, from MLA constituency offices, from the Ombudsman's office, or from other sources.

The Present Review Mechanisms

The Power of the Arbitrators to Reconsider Decisions

An important doctrine of our system of law says that once a judge has made a decision, he or she has exhausted jurisdiction and therefore cannot change it. It can only be changed by a higher court. Lawyers call this doctrine by its Latin name - **functus officio**. In shorthand, we say that a decision-maker is "functus", meaning that he or she has no further power to rule on a matter.

The RTA provides that arbitrators' decisions are final. This means that arbitrators are functus once a decision has been made. Even if an arbitrator subsequently became convinced that a decision was wrong, there would be no power to change it. The only remedy available to the parties under the present system is to apply for judicial review.

There are exceptions to this rule. The law recognises some circumstances in which a decision-maker, including an arbitrator, may not be functus even after a decision has been made. As well, tribunal can change a decision where it is authorized to do so by statute. Finally, most statutes, including the RTA, contain provisions which permit a decision-maker to correct clerical errors.

A general rule of law which does not need to be contained in a statute says that if the decision-maker makes certain kinds of legal errors, the error will make the decision void or a nullity and the decision-maker will not be functus.

For example, if an arbitrator made an order requiring a bank, who was not a party to the dispute, to pay a tenant's rent to a landlord, the decision would be void because an arbitrator has no legal power to make rulings which affect someone who is not a party to the dispute. This would be a case where we would say that the arbitrator exceeded the legal power provided in the RTA or, in legal terminology, that he or she "exceeded the jurisdiction". Jurisdictional errors may be more likely than other kinds of errors to render a decision void. A decision may also be void where it was obtained by the fraud of one of the parties.

To the law, a decision which is void is as if no decision was ever made. The tribunal may be bound to start the process afresh in order to cure the defect. If no decision was ever made, the decision-maker cannot be functus. If not functus, the decision-maker has the power to hold a new hearing and reach a different conclusion.

In a recent case called **Chandler et al. v. Alberta Association of Architects et al**, (1990) 40 Administrative Law Reports 128, the Supreme Court of Canada considered how the doctrine of functus officio applies to administrative tribunals. The Court concluded that it is in the public interest that the status of a decision be clear when it has been made, so that the parties are not in doubt about whether they are bound by it. For this reason, the law generally prefers the view that decisions not be reopened, but instead must be appealed.

However, the Court said that if the terms of a statute creating an administrative tribunal indicate that the legislature did not place a heavy value on finality, then it may be desirable that there be some power to reconsider decisions. The majority of the Court said:

> Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, the principle [of functus officio] should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by the enabling legislation. (at 142)

The provision in the RTA which says that an arbitrator's decision is final and binding is a strong indication that the legislature did not intend arbitrators to have the power to reconsider their decisions. It is probably correct to say that they may only do so in circumstances that the courts have traditionally recognized as rendering a decision void, but there remains some real uncertainty in this area of the law.

In several Canadian provinces, the legislatures have included powers to rehear, reconsider, and vary orders in the powers they have given to their residential tenancy decision-makers. These express powers are often included in the statutes which govern other kinds of administrative tribunals. Including such powers in the RTA is one option to be considered in evaluating the kinds of remedies which may be appropriate for altering an arbitrator's decision.

The Judicial Review Procedure Act

Landlords and tenants may apply to have the decisions of arbitrators reviewed under the Judicial Review Procedure Act. Such an application is called an application for judicial review. A judicial review

application does not constitute a full appeal on the merits of the decision and it does not give the applicant a new hearing before the judge. Primarily, a judicial review hearing is limited to an examination of the fairness of the procedures used to arrive at a decision.

The judge reviews the fairness of the hearing process and the decision itself to determine if there has been a breach of the rules of natural justice. These rules relate more to the fairness of the procedure used in arriving at the decision than they do to the merits of the decision.

The courts generally defer to the expertise of administrative tribunals. They often say that they will not interfere with the merits of these decisions (as opposed to the procedure) unless they are "patently unreasonable". This means that a court may choose to allow a decision to stand even if the court might not have reached the same conclusion on the evidence.

Most administrative tribunals are governed by statutes which contain various mechanisms which allow the administrative tribunal, as a body of decision-makers, to develop expertise. Administrative tribunals are intended to be and generally do become experts in serving the public interest in the specialized area in which they make decisions. Such tribunals often develop general policies which reflect their expert opinions on the public interest, and these policies are reflected in the decisions of individual tribunal members.

Where the legislature has created this kind of expert administrative tribunal, it makes sense that there should be only limited forms of appeal from its decisions. It also makes sense that the courts should not lightly interfere with such an expert decision.

The RTA does not create an administrative tribunal of arbitrators who are intended to generate a corporate expertise in residential tenancy matters. The arbitrators are not usually experts at the time of their appointments, and they do not function as a group setting residential tenancy policy. The rationale for limiting the way judges review the decisions of administrative tribunals may not apply with the same force to the decisions of arbitrators.

However, as we saw in Chapter Two, the fact that a court is reviewing the decision of an arbitrator may in itself limit the form of review available. The courts have traditionally limited their review of the decisions of arbitrators not because of the arbitrators' expertise, but because the parties are seen to have voluntarily chosen a process which they intended to be final.

In the case of residential tenancy arbitrations, the government, not the parties, has decided that disputes will be resolved through arbitration and has decided that arbitrators' decisions will be final. In our experience, many landlords and tenants are amazed to learn that arbitrators' decisions are final. They usually learn this after the decision has been made.

In addition to the conceptual reasons why judicial review may not be appropriate as a remedy for residential tenancy arbitrations, there are also some practical reasons.

The body of law which a judge must consider on an application for judicial review is highly technical and inaccessible for non-lawyers. The Judicial Review Procedure Act is brief and its provisions cannot be understood without some knowledge of the legal principles to which it refers. For example, section 3 says:

> The power of the court to set aside a decision because of error of law on the face of the record on an application for relief in the nature of certiorari is extended so that it applies to an application for judicial review in relation to a decision made in the exercise of a statutory power of decision to the extent it is not limited or precluded by the enactment conferring the power of decision.

The result is that it is very difficult for someone who is not a lawyer to determine whether there are grounds for a judicial review application, to prepare the documents for the application, or to present an argument. To have a lawyer prepare and present the application is very expensive. Many tenants and landlords cannot afford the fees, which may be out of all proportion to the issues involved in the application.

Even if a party decides to proceed without a lawyer, there are practical difficulties. The filing fee is now $100, which in itself may be out of proportion to a security deposit dispute involving $250. The process is relatively slow. Unless an applicant obtains special permission from a judge, the application cannot be heard on less than ten days' notice to the other party.

Finally, if the application is successful, the judge may decide to send the dispute back to the arbitrator to be re-heard, which will create a further delay in obtaining a final decision. In the world of month-to-month tenancies, justice delayed may well be justice denied for landlords and tenants.

For these reasons, we are of the view that judicial review under the Judicial Review Procedure Act does not

offer the most appropriate remedy for reviews of residential tenancy arbitrations.

Alternatives to Judicial Review

Preventative Measures

It is not advisable to place more emphasis on the remedies which may be available after the decision than on the steps which might be taken beforehand to improve the general quality of decisions.

The most cost-effective measures available to the government are those which reduce the number of arbitrations. The more information and advice the public receives about their rights and obligations, the fewer disputes there will be.

The mandatory use of a standard form residential tenancy agreement written in plain language and describing the minimum statutory rights and responsibilities of the parties could limit uncertainty and decrease the number of disputes. The parties could be free to include additional terms outside of the RTA so long as they were not inconsistent with it.

Informal telephone mediation may also be an effective way of reducing the number of arbitrations. Clarification of the mandate to provide information and mediation services is necessary, however, if the Branch is to improve the quality of these services.

Clear, merit based selection criteria and better training of arbitrators, frequent arbitrator-run policy seminars, a fee structure which does not unreasonably limit the length of hearings and is not a disincentive to producing written reasons for decisions, adequate support services, a contract which is long enough to foster independent and impartial decision-making, and a

fair and accurate evaluation process would all improve the quality of decision-making.

Better information about the nature of the arbitration process and realistic expectations might also lead to greater acceptance of decisions. In talking to complainants, we sense that there is very little knowledge of what an arbitration involves. As a result, people do not know how to prepare for hearings. They do not know what a relevant document is. They do not know when it is necessary to bring a witness. Perhaps most importantly, they do not know that in the present system, an arbitrator's decision is final. We have often heard complainants say that if they had known this, they would have approached the hearing differently.

There may also be steps the arbitrators can take which would affect the hearing process. There is a shared perception among the arbitrators, the Branch, and our office that while it is desirable to have an informal and friendly process, too much informality may lead to a lack of respect for the hearing process and the decision itself.

Each arbitrator has the legal right to determine his or her own procedure, and the procedures the arbitrators use differ from each other considerably. Some arbitrators have successfully experimented with arranging the furniture so that the parties are not uncomfortably close to each other and to the arbitrator. Some arbitrators ask the parties to take turns in presenting their cases and tend not to interrupt this process. Others question one or both of the parties and do not allow them to make presentations.

Some of the advocates we spoke to in the course of this study commented that it would be easier for the parties to prepare for a hearing if they knew what the hearing

process was going to involve. Lawyers and other advocates could also be of greater assistance in advising the parties beforehand if the process was more predictable. Without infringing on the arbitrators' right to determine the procedure, it might be helpful for the arbitrators to follow a common procedure as much as possible. It would also be helpful if some means existed to let the public know what that procedure would be.

In keeping with the concept of a private arbitration which only affects the parties to it, decisions of arbitrators are not published. Although it would be expensive to publish every decision, perhaps the arbitrators and the Branch together could identify and publish particularly important decisions.

To some extent, decisions reach the public through the staff of inquiry officers. In its initiatives to improve the quality of information the Branch gives out, the Branch has not included meetings between the arbitrators and the inquiry staff to discuss rulings under the RTA. There appear to be few discussions between these two groups, even though the work each does has a significant impact on the work of the other. Such discussions should not be precluded by the arbitrators' status as independent contractors, provided that the discussions only involve matters where final decisions have been made.

Finally, the RTA is not written in plain language. Many of the initiatives which have so improved the accessibility of the Small Claims Courts would be of great help to the Branch. To implement such initiatives, the Branch may require the type of budgetary assistance that made improved access to Small Claims Courts possible.

Since the landlords and tenants who use the services of the Branch are rarely represented by lawyers, the

introduction of plain language to the RTA as well to the forms and brochures published by the Branch should be a priority.

Some arbitrators suggested that an information video which included a mock hearing might be helpful. It could be distributed through public libraries, Legal Aid offices, and through government agents' offices (most of which have VCRs). It might also be possible to have cable companies show it on their public information channels throughout the province. Many people might prefer watching a video to reading even well-prepared printed information.

Internal and External Review of Decisions

Even with such measures, justice requires that there be an accessible remedy for clients who believe they have been denied a fair hearing or a correct decision.

Several issues emerged from our discussions with the arbitrators, the Branch, and the advocacy groups:

1. There seems to be some agreement that accessibility, speed and finality are the most important criteria for a residential tenancy review system.

2. Some argue that these criteria apply more strongly to review of non-monetary decisions.

3. An internal review process may meet the criteria for review of non-monetary decisions better than an external review process.

4. The altenatives available for review are limited by the type of record made of the hearing. Many quasi-judicial tribunals tape-record hearings and then make copies of the tapes available so that the parties

may have them transcribed if they wish. This practice allows an effective review without the need for a full rehearing of the evidence.

5. An effective review is not possible without some reasons for a decision which clearly relate the evidence and the law to the conclusion. The reasons need not be lengthy but they must explain the result.

6. It may be desirable to require applicants to show that they have grounds for review rather than allowing all reviews to proceed simply because they have been requested.

We believe that it is necessary to provide an accessible, fast, and final alternative to judicial review, and that the government should decide on the most appropriate model after public consultation with affected groups.

In our study of the alternatives, we are struck by the number of different residential tenancy schemes provincial governments have devised in Canada. Some of these schemes have been highly inventive in their attempts to avoid various legal pitfalls. We are also struck by the number of different mechanisms available in British Columbia for the review of decisions of administrative tribunals. No consistent criteria appear to have been developed for choosing review processes for different tribunals.

The difficulty of choosing an alternative to judicial review of arbitrators' decisions is increased by the number of alternatives available. These include:

* internal review for all decisions;

* internal review for non-monetary decisions and security deposits only, judicial review for everything else;

* an external specialized residential tenancy appeal tribunal for all decisions;

* appeal to Small Claims with a new hearing for all decisions;

* appeal to Small Claims only on monetary decisions;

* new hearing in Supreme Court for monetary decisions only (similar to the right of a new hearing in Supreme Court as a form of appeal from Small Claims decisions);

* a statutory power for arbitrators to rehear, reconsider, and vary their decisions;

* designation of a senior arbitrator to read all files and decide what should be reheard;

* a specialized form of judicial review similar to the process in the Rentalsman legislation;

* a specialised form of appeal similar to the process in the Commercial Arbitration Act.

The Branch as an Administrative Tribunal

In our review of the administration of the Residential Tenancy Branch, it has become evident that the Branch functions in a unique way. Although the RTA creates an arbitration scheme, in some respects the Branch tries to run the scheme as though it were an administrative tribunal.

To assess the impact of this, it may be helpful to review the way in which administrative tribunals typically operate. First, and perhaps most

importantly, there is often a structural separation between the tribunal and the line ministry. The tribunal has its own administrative and clerical staff and has no direct interaction with the line ministry. In this way, its independence is structurally protected.

Quasi-judicial tribunals are often composed of many decision-makers, who may conduct hearings alone or sit in panels. The legislation which governs them often provides for a Chair, Vice-Chairs and perhaps a Registrar, who perform the management functions associated with the work of the tribunal. The Chair and Vice-Chairs are also decision-makers, although they may devote a significant portion of their time to management functions as well as to hearings.

Appointments to a tribunal are typically made by Order of Cabinet for terms in the three to five year range. Some of those appointed are employees for the purposes of tax and benefits; some are not. The fact that they are employees for these limited purposes does not render them subject to the control of the line Ministry, because they are independent decision-makers. The part-time appointments may not be employees for the purposes of tax and benefits. However, the employee/independent contractor distinction does not appear to affect access to clerical and administrative staff in these tribunals.

In the case of a quasi-judicial tribunal, the government may not want to give the tribunal the power to develop regulatory policy independent of its decision-making functions. However, the tribunal's decisions may affect not only the immediate parties to the dispute, but also various groups in society. Over time the decisions will establish various principles which may govern the conduct of those affected.

The Supreme Court of Canada, in a recent decision in the case of **Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69 et al**, (1990) 42 Administrative Law Reports 1, has recognised the importance of consistency in the decisions of administrative tribunals. In relaxing a legal rule which had sometimes inhibited discussions among tribunal members, the Court recognised that it was undesirable for applicants to receive different decisions from different decision-makers on the same issues.

In a quasi-judicial tribunal, the Chair and Vice-Chairs may perform many of the management functions which, at the Branch, are performed by the director and managers. The Chair may assign decision-makers to hearings, set schedules, and supervise the tribunal's clerical and administrative staff. The Chair may also be involved in assessing and ensuring the consistency of decisions, and evaluating the performance of tribunal members.

Many functions which are inappropriate when conducted by the line ministry are appropriate when they are conducted by the decision-makers themselves. In our analogy to an administrative tribunal, the arbitrators are like the decision-makers of the tribunal. However, the director and managers of the Branch, who are structurally part of the Ministry, are attempting to play the management role of Chair and Vice-Chairs. In fact, all of the staff of the Branch are employees of the Ministry, not of any entity having a separate legal existence. Only the arbitrators are retained on contract by the Minister, as opposed to the Ministry.

The management role played by the Branch at present can impair the independence and impartiality of the arbitrators. The courts have traditionally placed a very high value on independence. As the Supreme Court of Canada stated in the **Consolidated Bathurst** decision noted above:

> Independence is an essential ingredient of the capacity to act fairly and judicially, and any procedure or practice which unduly reduces this capacity must surely be contrary to the rules of natural justice. (at 24)

The pure arbitration scheme set out in the RTA could have operated in a way which would have posed few risks to independence. However, such a scheme might have failed to meet the needs of the public. As we noted in Chapter Two, it may not make sense to treat landlord and tenant disputes as though each dispute was entirely separate from other disputes about the same issue. Fifty different decisions about the right to claim a security deposit do not assist landlords and tenants in making appropriate decisions in the course of a residential tenancy.

We believe that the Branch has developed many of its administrative and management practices in order to meet the public need for a consistent, predictable, and high quality system. In many ways, it may have failed to appreciate the extent to which its practices place independence at risk. On the other hand, its emphasis on the arbitrators' status as independent contractors fails to place appropriate emphasis on the service the public requires.

Nonetheless, many of the practices which have the potential to impair independence have originated in the attempt to meet a public need. In its structural attempt to act like an administrative tribunal, the Branch may, without realising it, be demonstrating the need for a structure which is more appropriate to the needs of the public than the minimalist scheme set out in the RTA.

The public need is for an accessible, inexpensive method of resolving disputes. An administrative tribunal structure may be the best model for meeting

this need while respecting the independence of the decision-makers. However, the constitutional validity of such a tribunal must be carefully studied.

To be constitutionally valid, the adjudicating function of the tribunal cannot predominate, but must be "necessarily incidental" to the broader policy goal intended by the legislature.

In 1981 the Supreme Court of Canada struck down provisions of the Ontario Residential Tenancies Act on the basis that the chief role of the Residential Tenancy Commission was not to carry out an administrative function but to adjudicate private disputes.

However, a similar legislative scheme in Quebec was upheld by a unanimous Supreme Court of Canada in 1983. In two other provinces, provincial courts of appeal dismissed constitutional challenges to comparable landlord and tenant laws. These were the B.C. Rentalsman legislation (in 1979) and Nova Scotia's Rent Review Commission legislation (in 1984). Alberta's legislation was invalidated in 1978.

CHAPER SIX

SUMMARY OF RECOMMENDATIONS

1. We recommend that the government review the mandate set out in the Residential Tenancy Act in order to clarify its role in the regulation of residential landlord and tenant relationships.

2. If it is reasonable to assume that information about the rights and obligations of landlords and tenants will reduce the number of disputes, it is important that there be a clear legislative mandate for effective information services. We therefore recommend:

(a) that the legislation be drafted in plain language;

(b) that there be regional or toll free information telephone lines sufficient to serve a high demand;

(c) that there be an appropriate level of communication between the decision-makers and the information staff;

(d) that consideration be given to the mandatory use of standard form residential tenancy agreements which describe in plain language the minimum rights and responsibilities of the parties;

(e) that forms and brochures be drafted in plain language and be easy to use.

3. Some residential tenancy systems use two levels of mediation. Information or investigative staff may attempt informal mediations before a dispute has crystallized. Decision-makers may also attempt to mediate as a separate process from arbitration. Mediations conducted by information or investigative staff may be cost-effective if they are carried out in a sensitive, non-adversarial manner. If they reduce the number of hearings necessary, they reduce costs.

Mediations which occur after disputes have crystallized may also be desirable, but for a different reason. Parties may be more willing to accept a mediated solution than one which is imposed on them. Where they have a continuing landlord and tenant relationship, a mediated solution may mean that future disputes are less likely.

A mandate to investigate complaints may also reduce the number of disputes for which a hearing will be required.

We therefore recommend that government give careful consideration to establishing a specific legislative mandate to provide mediation and investigative services in landlord and tenant disputes.

4. Whether the decision-making process is called arbitration or is given another name, it is important that the system protect the independence of the decision-makers. At the same time, the public must be assured that the system contains appropriate mechanisms to ensure a high quality.

We recommend that decision-makers be selected on the basis of merit, receive adequate training, be compensated in a way which does not have a negative

effect on the quality of service the public receives, be retained for a term which reflects the value and importance of experience and the need for independence, and be evaluated fairly and accurately. Decision-makers should not be dismissed during their term of appointment except for cause.

We also recommend that written reasons for decisions be required where requested by a party within a specified period of time. The written reasons given should be full enough to form the basis for a record of the proceedings by relating the decision to the evidence and law.

5. As discussed in Chapter 5, we recommend that legislation contain an appropriate mechanism for review or appeal of decisions, to be selected after a review of the various options available and representation from groups in the community who would be affected.

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